

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
ATHENA ART FINANCE CORP., : Docket # 1:20-cv-04669-
 : GBD-VF
Plaintiff, :
- against - :
THAT CERTAIN ARTWORK BY JEAN-MICHEL : New York, New York
BASQUIAT ENTITLED HUMIDITY, 1982, : August 4, 2022
IN REM, :
Defendant. :
 : TELEPHONE CONFERENCE
----- :

PROCEEDINGS BEFORE
THE HONORABLE VALERIE FIGUERO, D.
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

THE CLERK: This is the matter of Athena Art Finance Corp. v. that Certain Artwork By Jean-Michel Basquiat Entitled Humidity, 1982, In Rem; docket number 20-cv-4669, the Honorable Valerie Figueredo, presiding.

Counsel, please note your appearance for the record, starting with plaintiff's counsel.

MS. CHRISTINE V. SAMA: Good morning, your Honor; Christine Sama from Goodwin Procter for Athena Art Finance Corporation. With me are Jon Shapiro and Jim Gatta from Goodwin Procter, as well.

HONORABLE VALERIE FIGUEREDO (THE COURT): Good morning.

MS. SAMA: Good morning.

MR. WEBSTER D. MCBRIDE: And good morning, your Honor. This is Webster McBride from Grossman LLP for intervenor plaintiff, Satfinance. And Judd Grossman is on the line, as well.

MR. GREGORY A. CLARICK: Good morning, your Honor. This is Gregory Clarick from Clarick Gueron Reisbaum with my colleague, Ashley Hall, on behalf of Delahunty Limited.

THE COURT: Good morning, everyone. This is Judge Figueredo. The conference was scheduled to address the issues raised in the June 23rd and then follow-up

1 letters on June 28th and, I guess June -- both follow-up
2 letters are from June 28th. So I guess, just to get the
3 discussion started, I know at our previous conference we
4 had had the issue come up as to whether Athena had, I
5 don't want to say preserved, but raised the deficiencies
6 in either Satfinance or Delahunty's productions prior to
7 2022, so prior to this spring, May or June. And I think
8 at the time -- and feel free to correct me if I'm wrong -
9 - Athena counsel had represented that they had raised
10 these objections in the summer of 2021 and that they
11 would provide some indication or letter or something to
12 that effect indicating that they had previously raised
13 these objections. So in the June 23rd letter I know
14 there was an Exhibit A attached, which is a letter from
15 June 30th of 2021, where Athena points to the -- indicate
16 that this was where they had previously raised these
17 objections to the production.
18

19 I guess the first problem with the letter is it
20 does seem to only be addressed to issues in Satfinance's
21 production and not Delahunty. And then the other problem
22 with the letter, but again tell me if I'm missing
23 something, is that there was a subsequent follow up
24 response and objection served by Satfinance on August
25 30th. So I would have thought that for Athena to argue

1
2 that they had adequately raised these objections before,
3 that they would have had to have come back after that
4 August 30, 2021, responses and objections from
5 Satfinance. And I don't think you've submitted anything
6 that indicates that after that point you then came back
7 with a response to the objections. Am I missing
8 something?

9 MS. SAMA: Your Honor, this is Christine Sama.
10 You're not. The letter is addressed to Satfinance. You
11 may have seen with respect to the June 20th letter as
12 well, they've sort of been taking the lead for both of
13 the parties at issue here. And sort of consistent with
14 that protocol, the deficiency letter was addressed to
15 them, as well.

16 But with respect to the August 30th responses
17 and objections, you're correct; those response are in
18 response to a different set of discovery requests. You
19 know, as was outlined in our letters, there was a long
20 period where there wasn't a lot of advancement on either
21 side, on either of these issues. And so I sort of, you
22 know, respectfully disagree that we were expected to have
23 to have to re-raise the same issues and say that they
24 were still a concern to us again, having already done so.

25 THE COURT: So am I -- so the August 30th dealt

1
2 with an entirely different set of requests, is that what
3 you're saying?

4 MS. SAMA: That's correct, your Honor.

5 THE COURT: Does either Mr. McBride or
6 Mr. Grossman want to respond?

7 MR. MCBRIDE: Yes, your Honor. This is Webster
8 McBride from Grossman LLP for Satfinance. And we agree
9 entirely with what you've said. These objections were
10 from June 2021, and they have been let to lie ever since
11 then. We produced a second production with additional
12 objections in August 2021. These objections were not re-
13 raised in any subsequent correspondence with us. They
14 were not referenced in Athena's status update to the
15 Court on February 22, 2022 -- that's docket number 101.
16 Athena deposed Satfinance's representatives under no
17 objections, no reservations of rights -- this was in
18 April and May of 2022. And these objections were not
19 even referenced in a post-deposition letter that Athena
20 sent us in May 2024 -- May 24, 2022, referencing other
21 documents that they were seeking. So these objections
22 have been let to lie for over a year now. Athena did not
23 move to compel. They did not even raise these objections
24 with the Court, bring them to the Court's attention until
25 fact discovery had closed.

THE COURT: When did fact discovery close?

MR. MCBRIDE: June 10th.

MS. SAMA: Your Honor, if I may? I just -- I'm a little surprised because this is the same chronology that we've been talking about; you know, the same lethargy between the parties that we've been talking about. There was no Rule of Civil Procedure that we're aware of that required us to raise the deficiencies again; yet, there are all these fundamental gaps in the productions of the other parties that are core to the issues in the case. They've alleged that they were in a partnership with Mr. Philbrick, who was the borrower from our client, who is now in prison. And they refused to produce communications with him about the core issues in this case. And that's something that needs to be fixed. We've fixed the deficiencies that they raised only recently, and they haven't fixed theirs.

THE COURT: I mean, I get your point that there's technically not a Rule of Civil Procedure, but there is something to be said about the fact that if you don't follow up on your objections, the other parties can presumably -- if after a year you don't raise the issue again, that they might think that maybe you've let them go or they're settled, particularly where you did go and

1
2 take depositions and continue on and never -- didn't come
3 back and say hey, these deficiencies are still
4 outstanding. It seems -- like, I guess I understand
5 there was a change of counsel and maybe that's why the
6 objections are now being raised.

7 I'd like to -- Ms. Sama mentioned that the
8 August 30th, 2021, responses were not really -- from
9 Satfinance -- were to a different set of discovery
10 requests or responses, but I don't think I have the -- or
11 at least I don't have it in front of me, the August 2021
12 responses and objections. Is it the case that they
13 really are not directly related to the June 28th --
14 sorry, the June 30, 2021, objections raised by Athena?

15 MR. MCBRIDE: This is Webster --

16 THE COURT: I guess I'm addressing this to
17 Mr. McBride or Mr. Grossman.

18 MR. MCBRIDE: Yes. This is Webster McBride for
19 Satfinance. And, yes, so Athena served two sets of
20 discovery requests on us, and the objections to our
21 objections referred to our objections to their first
22 discovery requests. August was in response to a second
23 set of discovery requests from Athena.

24 If I may, though, one -- you mentioned that the
25 change in counsel may have had something -- provided some

1
2 explanation for these objections being resuscitated. We
3 wanted to alert the Court that something we learned just
4 yesterday at a deposition is that Athena's present
5 counsel, Goodwin, has in fact been involved in this
6 action since -- well, prior to their formal substitution
7 as counsel of record in June 2022, including advising
8 their clients to communicate directly with our client,
9 who is obviously represented by counsel, and with those
10 communications including potential witness tampering, all
11 of which is troubling on, you know, any number of levels.
12 And we can get into that as the Court would like.

13 THE COURT: Ms. Sama, did you want to respond?

14 MS. SAMA: If I may, my colleague, Mr. Shapiro,
15 is here. He was most directly involved in that
16 deposition, if I could let him address that?

17 THE COURT: Sure.

18 MR. JONATHAN SHAPIRO: So good morning, Judge.
19 This is Jonathan Shapiro. I guess on the responsible
20 partner for Yieldstreet, we've been representing Yield
21 Street -- and Athena's a division of that -- for, I don't
22 know, going back a couple of years. But we were not
23 counsel in this particular case. I think that's a flat
24 mischaracterization of the deposition yesterday.

25 With respect to the deposition yesterday -- and

1
2 I realize that courts stick to the agenda that's stated
3 as opposed to coming attractions -- but there were a lot
4 of issues about yesterday's deposition. We're working on
5 a motion based on that deposition. It was a deposition
6 of the founder of Yieldstreet. It was a deposition that
7 was required to be in person, even though we wanted it by
8 Zoom. And it was a deposition in which the founder of
9 Yieldstreet was examined on precisely two documents, both
10 of which were explicitly on their face settlement
11 communications, neither of which had been produced
12 previously and only one of which Mr. Weiss, who's the
13 founder of Yieldstreet who was called to testify in
14 person, had ever seen or like was a party to. So we have
15 very substantial issues about that deposition.

16 But to respond precisely and close this out,
17 unless your Honor wants to hear more, number one, there
18 was zero witness tampering. That's just a flat-out, you
19 know, false statement. Number two, me personally and
20 this law firm was not advising anybody with respect to
21 witness tampering or non-witness tampering with respect
22 to the like 2021 settlement communications that were the
23 subject of yesterday's deposition. We'll have a motion
24 on that. We wouldn't expect your Honor to want to hear
25 anything about it until those papers are filed and can be

1 considered sort of in the usual course under the rules.

2 Thank you, Judge.

3 THE COURT: Okay. Thank you.

4 MR. MCBRIDE: If I may, your Honor?

5 THE COURT: Yes, go ahead.

6 MR. MCBRIDE: This is William Blumenschein for
7 Satfinance. We didn't say that they were formal counsel
8 in this case, but we did say that they counseled their
9 client to communicate with our client about this case.
10 Specifically, we have communications that Mr. Weiss is
11 on, including a text message of his one week prior to our
12 client's deposition in this case, in which Mr. Weiss
13 threatens to expose our client as, quote, "criminally
14 fraudulent," end quote, at that deposition unless our
15 client comes to the settlement negotiating table. So we
16 have serious concerns about coercion and witness
17 tampering.

18 However, not only did Mr. Weiss fail to produce
19 that text message, which was clearly responsive to the
20 subpoena we served on him, but when at deposition we
21 sought to probe those communications, counsel asserted
22 privilege over all such communications, including those
23 intended to be and ultimately in fact relayed to our
24 client. And Mr. Weiss stated repeatedly that everything
25

1 he said in his communications was, quote, "at the
2 direction of counsel," end quote. So we also have ethics
3 considerations about counsel directing a client to
4 communicate directly with a party that counsel knows to
5 be represented and, it bears repeating, where the content
6 of those communications may amount to witness tampering
7 and where the witness testified that. And we've just
8 received the transcript now, but the witness testified
9 that, quote, "Any intent that I had to convey to Mr.
10 Pesko" -- that's our client -- "about anything that had
11 to do with this topic was under the advice of counsel."

12
13 So, you know, we were hopeful, and we came
14 before you six weeks ago, that Athena's having engaged
15 new counsel could get things back on the track with
16 discovery. But, unfortunately, we find ourselves, you
17 know, potentially in a worse place than we were back
18 then. And yesterday's deposition and, you know, conduct
19 at that deposition only exacerbated those concerns.

20 I'd also like to highlight, just going back to
21 your marching orders from our last conference, Athena,
22 with new counsel, has simply and bafflingly ignored your
23 directive to have their in-house counsel provide an
24 account of how they failed over two years of litigation
25 to provide a single internal communication among other

1
2 glaring production deficiencies. And Athena's production
3 since that conference only puts in stark relief the scale
4 of those deficiencies, as Athena's produced 50,000, five-
5 zero-thousand pages in the last six weeks, after
6 producing a total of 3,500 pages over the two years
7 prior. Athena has very competent, very experienced in-
8 house counsel, and this discrepancy is not an oversight.
9 Something was done wrong, and we and the Court are
10 entitled to an explanation, as we're concerned about
11 possible spoliation issues, both with regard to Athena's
12 prior production and with regard to Mr. Weiss, who either
13 deleted this text message or failed to search for it --
14 we don't know. But we remain concerned that we are -- we
15 still may not have all that we're entitled to.

16 THE COURT: Okay. Ms. Sama, were you able to
17 speak to your client to get an understanding as to what
18 happened in terms of the document collection and
19 production?

20 MR. SHAPIRO: So, Judge, it's Jonathan Shapiro.
21 I had those direct conversations. Without waiving
22 anything, I can represent the following facts to the
23 Court. Number one, at the commencement of the
24 proceeding, indeed, before the commencement of the
25 proceeding that's before the Court, because it was

1 removed from state court and there was an ancillary
2 bridge proceeding, documents were preserved. So I don't
3 know where the charge of spoliation comes from. I think
4 it's unsubstantiated. It's certainly inconsistent with
5 my understanding. So point number one, like nothing went
6 missing. All right? Point number two is that documents
7 were produced by predecessor counsel, and documents were
8 withheld in that production. The documents that were
9 withheld had been preserved, and they were withheld on
10 the basis of objections that were provided to that
11 existed in draft form were approved by the client without
12 waiving any privileges. The result was those were never
13 served by predecessor counsel, and they are now
14 predecessor counsel. And I just need to leave it at that
15 because of, obviously, the sensitivity of that particular
16 issue.

18 So, number one, everything was preserved.
19 Number two, everything was appropriately withheld
20 pursuant to objections. The problem was that the
21 objections were not served. That is a big problem,
22 right? That's why we're involved in the case now, and
23 that's why we've since fixed that problem. I appreciate
24 counsel's recognition that we produced, you know, just
25 under 50 pages -- under 50,000 documents to address that.

1
2 Opposing litigants have already been enormous
3 beneficiaries of that because of predecessor counsel's
4 foot fault in not serving objections as was required.
5 Nothing was withheld on the basis of, you know, scope,
6 dupli -- you know, unduly burdensome. There's none of
7 that here. That's why they have the 50,000 pages. So
8 net-net everything was done appropriately other than
9 counsel didn't serve objections, and Athena has already
10 seriously paid the price for that. And in the course of
11 the last, what, five, six weeks, we've (indiscernible),
12 we've produced the documents, a ton of documents.
13 There's certainly no prejudice to any other litigant
14 here. If anything, there's, you know, there's been
15 prejudice to Athena because its counsel didn't serve the
16 objections, and we're just stuck with that.

17 Right now we want to move on and we want to
18 litigate the case on the merits. There's a number of
19 open items. They all were preserved at the same time in
20 the same kind of lethargic way. I can't speak to why it
21 was, but there was a total lack of energy on both sides
22 here. I can't change that, but those issues were raised.
23 They were raised clearly, and here we have a circumstance
24 where the very basis for the challenge to this artwork by
25 Satfinance, the party to whom the letter was addressed,

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is in agreement between Satfinance, its principal, a gentleman by the name of Mr. Pesko, Sasha Pesko, and a guy who is in jail named Inigo Philbrick, who is like an international fraudster and has since been sentenced for that.

The very basis for their claim to this painting is as relationship between the incarcerated Mr. Philbrick and the opposing litigant, Mr. Pesko, and Satfinance; and we don't have full discovery of communications involving that relationship. They were requested; they were complained about in the letter. Everybody here moved slowly at the same glacial pace -- I can't fix that. We own the mistake that was made. The lawyers for Athena did not serve objections. We have fixed that problem, but there is nothing that's been missing. And just simply because it was said, and I just have to say it, there was no witness tampering. There was no nonproduction of a text message thread that Mr. Weiss, the founder of Yieldstreet, wasn't on. We can deal with those issues -- apparently now there are ethical issues - - we can deal with all of those in the usual course if they get raised by motion.

But in terms of the issues that are before the Court, which are the ones in the June 23rd letter, we

1
2 fixed and cleaned up our house. Nothing went missing, no
3 one acted inappropriately, there's been no prejudice to
4 the other side. It's a question of remedy, and we are --
5 we think we're entitled, Judge, to, you know, to a
6 production of communications, for example, between and
7 among the incarcerated borrower, Inigo Philbrick, and
8 Satfinance, Sasha Pesko, on the other side, because
9 that's the very basis for their claim to own a piece of
10 this art, some secret deal they had.

11 Thank you.

12 MR. MCBRIDE: Your Honor, if I may?

13 THE COURT: Sure. Go ahead.

14 MR. MCBRIDE: This is Webster McBride for
15 Satfinance. With respect -- what Mr. Shapiro just told
16 you about their objections is simply false. Athena did
17 eventually, over a year past its deadline to do so, serve
18 some objections. There is nothing -- there is nothing in
19 those objections that allows Athena to withhold any, let
20 alone every, internal communication. Athena produced
21 zero internal communications. There is no objection in
22 their objections served a year-plus after their deadline
23 to do so that allows them to withhold internal
24 communications. There's also nothing that allows them to
25 withhold various communications with Mr. Philbrick, the

1 individual Mr. Shapiro was just referencing, which they
2 failed to produce for reasons beyond us. And, yeah, and
3 those objections are facially absurd. For example, those
4 objections, which were served a year-plus after the
5 deadline, so we didn't have the opportunity to push back
6 on them, set a start date for production of three days
7 prior to the transaction that is at the core of this
8 case, which is laughable on its face. But, of course, we
9 had no opportunity to meet and confer about that and to
10 reject that unilaterally-established start date for
11 producing documents.
12

13 So those objections are full of problems. They
14 certainly do not provide an explanation for Athena's
15 various production deficiencies, which is why we have
16 been asking ever since Athena's predecessor counsel left
17 the case, meaning we couldn't have addressed this with
18 them any longer, which is why we have been asking for an
19 affidavit from Athena's in-house counsel who was there
20 and running the show at the time, explaining how this was
21 possible that instead of us receiving 53,000 documents
22 over the first two years of the case, we only received
23 3,000 documents.

24 THE COURT: Okay, let me just take a step back.
25 Mr. Shapiro, you have indicated that because the

1
2 objections had been drafted but not served by predecessor
3 counsel, that you subsequently produced documents, and
4 nothing was withheld on the basis of scope or duplicity,
5 those types of objections. Mr. McBride, I believe,
6 indicated that you haven't produced emails or
7 communications with Philbrick?

8 MR. SHAPIRO: So the first question is correct;
9 we have not withheld anything on the basis -- on any
10 basis other than attorney-client and work-product
11 privilege.

12 THE COURT: Okay.

13 MR. SHAPIRO: Including scope or whatever. I
14 mean, I can't -- because we didn't go through the
15 exercise, Judge, of the 50,000 pages -- it would have
16 been a lot less than that. So we are not resting on
17 objections that were untimely. We blew that, and we own
18 that. Okay?

19 THE COURT: Okay. So you don't --

20 MR. SHAPIRO: Point number --

21 THE COURT: So -- I'm sorry, I don't want to --
22 I didn't mean to --

23 MR. SHAPIRO: Oh, no, no, I --

24 THE COURT: -- interrupt; I just --

25 MR. SHAPIRO: -- answer your question.

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THE COURT: You've only withheld based on a
privilege objection?

MR. SHAPIRO: Correct.

THE COURT: Okay. And --

MR. MCBRIDE: And, your Honor --

THE COURT: Sorry, is this Mr. McBride?

MR. MCBRIDE: Yes. Webster McBride for
Satfinance. Just for your clarification, he's referring
to currently. But that does not explain why all these
documents were withheld for the first two years of this
case, which is what we want an explanation for. The fact
that they as of now have produced 50,000 additional
documents is not relevant to the question of what
happened in the initial document retention, collection,
review, production that allowed them to --

THE COURT: Could I --

MR. MCBRIDE: Yes.

THE COURT: Sorry. I understood him to say that
predecessor counsel and the company, Athena, had
preserved the documents, as they were required to do, was
contemplating objections that were drafted but counsel
dropped the ball and never served them. And so that
would explain why so much time went by that they didn't
produce the documents. Now that they've realized that

1 the objections would be untimely, they've since produced
2 everything except for privilege documents. And they're
3 representing that the company appropriately had a
4 document-retention policy in place.

5
6 MR. MCBRIDE: But, again, your Honor -- this is
7 Webster McBride for Satfinance -- the objections that
8 they belatedly served would not have provided any basis
9 for them to withhold every single internal communication.
10 So those objections are an insufficient explanation for
11 what happened during the first two years of the case.

12 THE COURT: Oh, I see. So you're saying that
13 initially -- I'm sorry if I'm a little slow on picking up
14 on this -- but they withheld all internal communications,
15 even ones not involving counsel for potentially
16 privileged. And you're saying I guess your understanding
17 of it is whatever objections they belatedly served would
18 not have been a proper basis to withhold all those
19 documents?

20 MR. MCBRIDE: That's absolutely correct. And
21 the reason we moved for the discovery conference
22 initially was to get to the bottom of how it could be
23 that a sophisticated entity such as Athena with an in-
24 house department with sophisticated, experienced in-house
25 counsel could have allowed the case to progress for two

1
2 years up to the eve of our 30(b)(6) deposition of
3 Athena's representative without having produced a single
4 internal communication and without having at that point
5 served any objection or even composed an objection that
6 would provide any basis for withholding those documents.

7 THE COURT: Okay. But they've since -- am I
8 wrong that they've since produced all of those internal
9 communications?

10 MR. MCBRIDE: They have represented that they
11 have, yes.

12 THE COURT: Okay. And then --

13 MR. MCBRIDE: And I will do it again, your
14 Honor, yes.

15 THE COURT: Okay. And so you have all the
16 documents. So now the only issue is like why it
17 happened. But you have them now?

18 MR. MCBRIDE: So Webster McBride for Satfinance.
19 We have all of the internal communication -- they have
20 represented -- in their last cover letter they
21 represented that they had completed production of all
22 internal communications. It is not clear to us whether
23 they have completed production of all external
24 communications, as well. And as far as we can tell, they
25 have not produced any documents from June through

1 December of 2016, which our document requests called for.

2 THE COURT: Okay, and just one second before we
3 move onto that question. You said you had deposed their
4 30(b)(6) witness, but you did so without having had any
5 of the communications?
6

7 MR. MCBRIDE: We did not. We had to adjourn
8 that deposition because of these production deficiencies.

9 THE COURT: Okay. So you have yet to take that
10 30(b)(6) witness deposition?

11 MR. MCBRIDE: Correct. And we are -- what we
12 are looking for is, A, an explanation of what happened
13 during the first few years of this case so that we can
14 then consider the appropriate remedy. And we are then
15 looking for production of all responsive documents to our
16 document requests to be complete, at which point we are
17 eager to move forward with the 30(b)(6) deposition, among
18 others.

19 THE COURT: Okay. So, Mr. Shapiro, what about
20 the external communications? Can you represent that
21 those have all been produced?

22 MR. SHAPIRO: Absolutely, Judge. And, in fact,
23 there's some -- I'm a little bit confused about this
24 question about the start date, but we produced and we
25 sent a letter to opposing counsel, I think on June 10,

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2022, in which we didn't just tell them what the start date was, which was a start date of January 1, 2017, but we listed all the custodians we were searching, all of the search terms, and there were like dozens of them.

Listen, we approached this, Judge, knowing that there was this problem. Like, if anything, we overcorrected here, from our perspective. And I'm not looking for credit for that; I just think at some point we just need to move on. Okay? The objections that were served or not served, like that's history; we're not relying on them. They've gotten the benefit of not having to litigate over objection; that's fine. We just want to move on with this case at some point. And if we have to deal with incriminations about misbehavior and so forth, I guess we'll do that in the usual way. But we just want basic discovery that was sort of served and preserved at the same time, right, of the problem here, you know, that we've been called --

THE COURT: What about the -- what about the June through December 2016 communications that he mentioned not having anything from that period?

MR. SHAPIRO: So I believe there was production of documents within that date range previously. However, we specifically sent a letter to opposing counsel on

1 June 10, 2022, in which we like identified -- there's
2 three columns -- I'm looking right at it -- date range of
3 documents we'd be producing. January 1, 2017, through
4 October 11, 2019. We list five custodians. We list
5 search terms, including external email addresses. We
6 didn't draw any distinction between internal or external
7 whatsoever, right. We sent this to opposing counsel on
8 June 10, 2022, so they saw what we were doing to fix the
9 problem. And this is the first I think I'm hearing about
10 some sort of date issue. But we've been transparent like
11 in this process that the 50,000-odd additional pages were
12 from January 1, 2017.

14 MR. MCBRIDE: If I may, your Honor?

15 THE COURT: Sure. Go ahead.

16 MR. MCBRIDE: Webster McBride for Satfinance.
17 Mr. Shapiro is correct; they sent the letter on June 10th
18 providing a start date of January 1st. On June 13th I
19 wrote them saying, among other things, quote, "Your
20 proposed date range begins January 1, 2017, but it should
21 begin no later than June 6, 2016, this being, one, the
22 date on which Kenny Shachter introduced Inigo to Andre
23 Denasay by email; and, two, approximately one month prior
24 to Athena's first loan to Inigo in July 2016. And that
25 was giving them the benefit of six days -- the first six

1 days of June, which would be responsive to our requests,
2 but which we, you know, agreed to waive. But this was
3 brought to Mr. Shapiro and his colleague's attention
4 three days after he sent the letter he's referring to.
5

6 MR. SHAPIRO: And, so, Judge, I'm looking at
7 Ms. Sama here across the table. We think there was
8 further email on this, so I honestly don't know where we
9 ended up on like the second two quarters of 2016. I
10 didn't even know there was an open issue with this. But
11 certainly as to external communications, we didn't like
12 filter those out. We did the same thing for external,
13 internal, Philbrick, this painting, Satfinance, Sasha,
14 Sasha within Pesko, Pesko within -- I mean, we've been
15 very transparent in how we thought about the process.
16 And it's resulted in an extraordinarily substantial
17 production for a case that's actually not all that large.

18 MR. MCBRIDE: Your Honor, Webster McBride for
19 Satfinance. We appreciate Mr. Shapiro's representation
20 that it does apply to external -- that their completed
21 production applies to external communications, as well.
22 We just raise that because their final cover letter had
23 specifically referenced internal communications only.

24 With regard to the last six months of 2016,
25 however, this is a key period because this is, as my

1 email that I just read from indicates, this is the time
2 when they made their first loan to Mr. Philbrick, the
3 fraudster, and so this is the time when they would have
4 done, presumably, due diligence on, or at least their
5 initial due diligence, on Mr. Philbrick, the individual
6 and his companies. So it's important for us to have
7 discovery of that time period. We requested it in our
8 objections and requests -- I mean, excuse me -- in our
9 document requests. They failed to timely object. They
10 objected 14 months later, only. And so they should have
11 to produce for that entire time period.

12
13 THE COURT: Okay. So I guess I'd like to find a
14 way to make everyone as happy as possible under the
15 circumstances. And I guess this question would go to
16 either Mr. McBride or Mr. Grossman, but Mr. Shapiro had
17 previously indicated that Satfinance had withheld
18 communications between -- or the payments received from
19 Philbrick, Philbrick entities, and then communications
20 regarding Athena or Mr. Philbrick; is that the case, or
21 am I getting the category wrong?

22 MR. MCBRIDE: We objected -- we limited these
23 categories of document requests to documents concerning
24 the painting at issue in this action.

25 THE COURT: So you did produce communications

1
2 involving Mr. Philbrick that concern the painting?

3 MR. MCBRIDE: Yes. For example, we produced 400
4 pages' worth of text messages between Mr. Pesko and
5 Mr. Philbrick. And, you know, I don't have the number,
6 but countless emails, as well.

7 THE COURT: And I guess --

8 MR. MCBRIDE: And -- and -- I mean, and, your
9 Honor, just as an indication of incoming -- Goodwin came
10 into this case. They were looking for a way to make this
11 a two-way street rather than a one-way street. They dug
12 up these prior objections raised a year earlier by
13 predecessor counsel, and they just parroted those
14 objections. The fourth objection concerning documents
15 concerning payments, if you look at the original
16 objection, it's a null set. I don't want to get too far
17 into the weeds here, but, you know, they ask -- they
18 suggest that maybe we're not producing documents
19 concerning a loan against the painting when we agreed to
20 produce all documents concerning payments concerning the
21 painting, which would include documents concerning the
22 loan against the painting. So there's no "there" there
23 as far as payments go. And that's the case with --

24 THE COURT: So the --

25 MR. MCBRIDE: -- many of these other categories

1
2 that they judge dredged up from objections that had been
3 raised a year before, many of which had already been
4 sorted out.

5 THE COURT: Well, so the -- the issue with the
6 payments received from Philbrick, which I think
7 Mr. Shapiro had indicated earlier was something they were
8 seeking, you're indicating that you've already turned
9 over all of those documents that relate to that category?

10 MR. MCBRIDE: Concerning the painting, correct,
11 absolutely. And we -- we did, we never objected; we
12 always produced timely.

13 THE COURT: Okay, so Mr. Shapiro, can we assume
14 that that settles that issue with regard to those
15 objections?

16 MR. SHAPIRO: If I may? You settle the issues;
17 I don't. From our perspective, no. And here's why,
18 Judge. This limited-to-the-painting piece is a bit of an
19 issue, and here's why. Number one, this painting had
20 nothing to do with Athena, for example, until April 7,
21 2017, which is why we started the production, you know,
22 January 1. The relationship with Philbrick is a
23 borrower. So he's a borrower, and he secures these art
24 loans. He ran a gallery or something, and he secures
25 these loans with like many paintings. The painting that

1
2 Satfinance and Delahunty claims to own had nothing -- you
3 know, didn't get on stage until April 7, 2017.

4 The reason we asked for the discovery of the
5 relationship between and among Pesko -- Mr. Pesko --
6 pardon me -- Satfinance and Inigo Philbrick broadly is
7 because they had a partnership agreement. They call it
8 the Spirit of Partnership. This was like some sort of
9 secret partnership among these two guys in Europe to own
10 a painting that they never secured in any public way. It
11 was kind of like we privately own this painting. The
12 painting, according to their document, was purchased from
13 a green grocer somewhere in rural Pennsylvania. And one
14 of these gentlemen is now in prison.

15 So the reason we asked for communications
16 between and among Pesko and Inigo Philbrick is because
17 that relationship is relevant beyond this one painting.
18 We understand that they had been sort of doing stuff with
19 other paintings going back any number of years. So
20 that's why limiting it to this painting, you know, may
21 be, as counsel has represented, a null set or maybe a
22 sheet of paper or two. But we think that we would be
23 fairly under the rules entitled to reasonable discovery
24 of the business relationship between two people who
25 somehow privately claim to own a painting that was in

1
2 Athena's safe in New Jersey or hanging on a gallery wall
3 and the subject of UCC liens. So that's why narrowing it
4 to the painting, if the Court were to narrow it to the
5 painting, maybe we're done with that item. But we just
6 think that that is a very narrow reading of the scope in
7 dispute, Judge.

8 MR. MCBRIDE: And, your Honor, if I may?

9 THE COURT: Sure, sure.

10 MR. MCBRIDE: Webster McBride for Satfinance. I
11 didn't hear anything in Mr. Shapiro's discussion there,
12 respectfully, that would be any basis for extending
13 relevance outside of documents concerning the painting.
14 We agree with what he said. This case involves a
15 business relationship between Mr. Pesko and Mr. Philbrick
16 with regard to this particular painting. And we have,
17 from the outset, agreed to produce and we have produced,
18 everything concerning that painting. And I didn't hear
19 anything explaining why further discovery is necessary in
20 this regard.

21 THE COURT: The relationship between Mr. Pesko
22 and Philbrick dates back how long?

23 MR. MCBRIDE: I don't --

24 THE COURT: The business relationship?

25 MR. MCBRIDE: -- I don't -- Webster McBride for

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Satfinance -- I don't recall off the top of my head. I can try to get that information for you, Judge, but I don't have it at my fingertips.

THE COURT: Okay, no, that's okay. I'm just trying to get a sense of exactly the scope of the request, how broad it would be if we're talking about all communications between Mr. Pesko and Philbrick.

MR. MCBRIDE: Yes, and I think the concern would be less -- you know, the start date for production would not change, so how far back the relationship goes wouldn't impact that.

THE COURT: I see. But I guess -- in a sense I was trying to figure out how unduly burdensome this type of request could be. Like, were they exchanging many communications? Were they in constant -- like, were they constantly communicating? Is this just like -- were there just -- were there a bunch of transactions that they entered into with a bunch of different paintings?

MR. MCBRIDE: I don't have hard data at my fingertips. There were transactions involving other paintings. You know, I think that really it's just a matter of fairness to our client, who went through the production process years ago and now, through no fault of his own, only through the fault of Athena, is -- Athena

1
2 is asking to have discovery of his documents reopened.
3 We'd have to go re -- re-review, assess all of this. You
4 know, I don't have -- I don't have hard numbers in terms
5 of the scope or the burden, but it would be significant
6 and at a time when from our client's perspective this
7 should have been long done.

8 THE COURT: There's no mention --

9 MR. JUDD GROSSMAN: Your Honor, this is Judd
10 Grossman for -- just to add to Mr. McBride, it would be
11 extremely burdensome. They had a business relationship
12 which involved a number of different artworks totally
13 unrelated to the case. Over that period of time they
14 communicated about those paintings, about other unrelated
15 transactions, as well as personal communications. So not
16 only is it irrelevant, not only was it not called for
17 initially; it would be incredibly burdensome even if this
18 were day one.

19 THE COURT: Okay. Mr. McBride, you have
20 previously indicated that there were objections you have
21 served, that there were documents you wanted that Athena
22 had not produced. And other than the internal
23 communications and external communications, is there any
24 other category that we're talking about?

25 MR. MCBRIDE: Based on Mr. Shapiro's

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2 representations on this call, I believe the -- what
3 remains outstanding is June through December of 2016 --
4 that would be internal and external. But, otherwise,
5 based on Mr. Shapiro's representations, I understand
6 Athena to have completed production of both internal and
7 external communications and other documents otherwise.

8 THE COURT: And, Mr. Shapiro, is there -- can
9 you just explain why you're looking for all payments from
10 Philbrick related to -- and maybe this -- maybe you
11 already did, but if you just want to explain it again --
12 for all acquisitions, all investments, partnerships,
13 coownership, everything besides just this particular
14 painting?

15 MR. SHAPIRO: Absolutely, Judge. The first
16 point is that the very request from, you know, opposing
17 litigants and counsel for documents going back to 2016 is
18 based on the notion that relationships between the
19 parties are relevant even if not tethered to the
20 painting. And that's because Athena did not take
21 security in this painting until, you know, April 7, 2017.
22 So there ought to be some symmetry there.

23 Moving beyond that, this is super strange,
24 Judge. Athena is a lender. It gets reps from a borrower
25 that it owns the painting. Athena physically has this

1 painting; it has it today in like some secret safe. I
2 already just said the state -- right? It has UCC liens
3 that are record notice that it is like the priority
4 lienholder and has security, both physical custody and
5 UCC lien custody -- if that's a term, right. Then, out
6 of the blue, these other claimants, Satfinance,
7 Mr. Pesko, claims that he has some sort of secret
8 partnership. They have a document. They call it the,
9 quote, "Spirit of Partnership," close quote, in which
10 there's this undisclosed ownership, the secret ownership
11 in a Basquiat. It's a little -- it's kind of unusual,
12 Judge. It's a really strange relationship. There's no
13 UCC filings. They own a painting, but no one has the
14 painting. I mean, we would suggest that we are
15 appropriately entitled to discovery about how these two
16 gentlemen in Europe sort of are doing business in 12 \$20
17 million paintings that no one knows they own. So that
18 was why we asked for discovery that was broader than this
19 particular painting.

21 Apparently, because it was just stated on the
22 record, they've done this before. So we'd like discovery
23 of that. No one has ever suggested that even frequent,
24 you know, texting or emails between two gentlemen, it's
25 not like -- it doesn't make this the Microsoft case.

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2 It's not like warehouses or the electronic equivalent of
3 same. So that's why we asked for it and that's why we
4 think it's discoverable.

5 But the idea --

6 THE COURT: But is there any --

7 MR. SHAPIRO: I beg your pardon.

8 THE COURT: -- is there any indication to think
9 that there -- you keep mentioning the fact that they've
10 done this before with other paintings. Is there any
11 indication to think that the transactions with the other
12 paintings similarly have this like -- I'm going to call
13 it fraud aspect, but maybe that's not the right word --
14 but just like something not above board?

15 MR. SHAPIRO: So, your Honor, the answer --
16 that's why we asked for the discovery and we have a basis
17 to ask for it -- I'm not going to suggest that there's
18 other sort of kind of quiet private dealings in artwork
19 that are hidden from lenders. It may very well be -- and
20 I think it's a reasonable question to ask. And bearing
21 in mind, Judge, they popped out of the box and are
22 asserting a claim in a federal court to an ownership
23 interest under circumstances in which one of them is a
24 fraud -- I'll say that. He's been adjudicated as such.
25 I'm not labeling other people anything. We get to try

1 the case after we do the discovery. But it is very
2 unusual for people to have private sort of like contracts
3 and, quote, "Spirit of Partnership," close quote,
4 documents about really expensive art that is not in their
5 possession. So we thought it was a reasonable discovery
6 request. I can't prejudge what that discovery would
7 reveal if it were to be provided.

8
9 MR. MCBRIDE: If I may -- if I may, Judge?

10 THE COURT: Go ahead, Mr. McBride.

11 MR. MCBRIDE: Webster McBride for Satfinance.
12 It is not at all unusual, particularly in the art world,
13 to have private agreements concerning multimillion-dollar
14 artwork. And what distinguishes Athena's position from
15 ours here is that there is absolutely no -- you
16 mentioned, you know, fraud is not the right word -- it's
17 not the right word. Nobody is alleging, there's
18 absolutely no shred of basis for any allegation that
19 anything that Satfinance did was fraudulent or in any way
20 wrongful. Nothing about Satfinance's transaction
21 involving this painting violated anybody else's rights in
22 the painting.

23 In contrast, Athena's transaction with this
24 painting was in violation of Satfinance's rights and in
25 violation of Delahunty's rights and perhaps others we

1 don't even know. But that is why it is -- that is why
2 Athena's due diligence as to Inigo Philbrick is very
3 relevant, and that is why there is no basis for any need
4 to be probing other transactions between Philbrick and
5 Inigo *[sic]*.
6

7 THE COURT: Okay. So on this issue I tend to
8 agree with Mr. McBride that I just haven't heard anything
9 from Mr. Shapiro that would indicate that the entire
10 scope of this business relationship between Pesko and
11 Philbrick would be relevant to the dispute involving this
12 one painting.

13 On the topic of the communications regarding
14 Athena and/or Philbrick, is this something that
15 Satfinance has already produced everything, or were some
16 of these communications withheld?

17 MR. MCBRIDE: So -- Webster McBride for
18 Satfinance -- again, we produced everything involving the
19 painting.

20 THE COURT: Oh, so this is the same issue where
21 you've limited it in scope to the painting?

22 MR. MCBRIDE: That's right. But, you know, as
23 another example of how these objections are just outdated
24 and not really relevant, the request for documents
25 involving Athena is essentially mooted by the cutoff for

1 production that both Satfinance and Athena agreed to.
2 Satfinance had never heard of Athena before
3 Mr. Philbrick's fraud came to light. So, again, there's
4 no "there" there.
5

6 But, in any event, we from the outset agreed to
7 and did produce all documents concerning the painting,
8 including communications with Athena -- there are none --
9 and communications with Philbrick.

10 THE COURT: Would there have been communications
11 with -- by Philbrick about Athena that did not concern
12 the painting?

13 MR. MCBRIDE: Not with our client. No, we --
14 no, we did not withhold anything concerning the painting,
15 other than on privilege grounds, whether it was from
16 Mr. Philbrick or otherwise.

17 THE COURT: And you've turned over
18 communications with the insurers regarding the painting?

19 MR. MCBRIDE: Another, as is provided or in the
20 agreement between Philbrick and Pesko or Satfinance,
21 Philbrick was to be responsible for insurance. And so,
22 again, our client had no communication with insurers,
23 because that was Philbrick's responsibility. We did
24 produce, as we said we would, documents sufficient to
25 show insurance coverage. We produced a certificate of

1 insurance that we received from Philbrick. But we had no
2 communications with insurers, because that was
3 Philbrick's responsibility.
4

5 THE COURT: Okay. And the undertaking posted in
6 the UK proceeding related to the painting, you produced
7 those?

8 MR. MCBRIDE: There we're not entirely clear
9 what is being referred to. We withheld documents on the
10 basis of privilege. This is a litigation that Satfinance
11 was a party to. Athena was also a party to that
12 litigation, so public documents related to that
13 litigation are within Athena's control. That litigation
14 also postdated the relevant period on which the parties
15 have agreed to produce discovery, so, you know, yet
16 another null set, as far as we can tell.

17 THE COURT: Okay. So, Mr. Shapiro, other than
18 the communications between Pesko and Philbrick that
19 relate to just the overall business relationship, as
20 opposed to the painting, is there any other category here
21 that you want to raise that you think Satfinance has not
22 produced documents for?

23 MR. SHAPIRO: Well, we -- listen, Ms. Sama and
24 I, we identified in the letter, you know, the Category of
25 A. You certainly heard us on the relationship, and the

1 Court has ruled. So sort of moving on, but, you know,
2 you asked about the communications with the insurers, the
3 UK proceedings. If your Honor is limiting the discovery
4 to the painting, then it may actually all be covered.
5

6 THE COURT: Well, I'm just looking at your
7 letter dated June 10, 2022, page three, where you say you
8 appeared -- there appeared to be additional deficiencies.
9 And you have several bullet points. I was just going off
10 of those bullet points, which is why I asked about
11 communications with insurers regarding the painting,
12 because that's specifically what your bullet point said.
13 And it sounds like Mr. McBride says there's nothing there
14 because they didn't have communications, and they
15 produced what they might have had. And then with the
16 undertaking, he gave his rationale there, too. And so
17 I'm wondering if there's anything left from those bullet
18 points that are worth discussing now.

19 MR. SHAPIRO: Sure. So, for example, and, you
20 know, one of them was communications with members of the
21 press or media. That might be nothing. I mean, I don't
22 know, because they're just sort of questions without
23 answers. If there's any like power of attorney or
24 advisory agreements, I mean, these are two gentlemen who
25 operated in the context of a partnership. So typically

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2 you'd see stuff like that. Not to be colloquial, but
3 like, you know, a power of attorney or signature
4 authority on accounts, advisory agreements. If they have
5 nothing in response to these, we're perfectly fine with
6 that because that would all be indicia of a legitimate
7 relationship. So the absence of it, including the
8 absence of insurance on a -- whatever -- \$20 million
9 painting, we're fine with that. I just want to make sure
10 that we understand whether any --

11 THE COURT: I don't think he said the absence of
12 insurance.

13 MR. SHAPIRO: -- thing was --

14 THE COURT: I think he just said they didn't --
15 they weren't the ones who secured it; so that's why the
16 wouldn't have the communications.

17 MR. SHAPIRO: Then that's fine. That's fine.
18 I'm happy with null sets; I just want to understand
19 whether things are being withheld or whether they don't
20 exist.

21 THE COURT: Okay. So we covered the categories
22 of the communications with Philbrick and Athena and the
23 payments received for Philbrick, Philbrick entities in
24 relation to the investment, financing, coownership,
25 acquisitions and sales of artwork, those categories.

1
2 We're limiting it to just the painting, which
3 Mr. McBride, I think previously had indicated have
4 already been produced?

5 MR. MCBRIDE: That's it, your Honor.

6 THE COURT: Okay. So, then that's -- I think
7 we're -- so communications with members of the press or
8 media, this would all be limited to the painting again.
9 And has that been produced? Or nothing exists?

10 MR. MCBRIDE: There again, Satfinance was
11 essentially a silent partner here. I don't think there's
12 any reason he would have -- would have to be going to the
13 press about this painting. I think it would only be
14 counterproductive. I don't think I can make a
15 representation right now definitively, but I would be
16 surprised if anything existed. And, again, we don't
17 think there's any basis for us to have to do that search
18 now.

19 THE COURT: And the powers of attorney documents
20 or (indiscernible) agreements, that --

21 MR. MCBRIDE: Yes, yes. Yes, Webster McBride
22 for Satfinance. That came out in deposition testimony a
23 grand total of one of those agreements exists. It
24 predated the relevant period on which we agreed to
25 produce. Nevertheless, we have agreed to produce it and

1
2 have now produced it.

3 THE COURT: Okay. So I guess the only open
4 issue would be those communications with members of the
5 press or media?

6 MR. MCBRIDE: I believe that's right.

7 THE COURT: And, Mr. Shapiro, why is it that you
8 need the communications with the members of the press or
9 the media about the painting?

10 MR. SHAPIRO: Well, certainly, your Honor, what
11 a claimant to own a piece of art says externally about
12 their ownership of the art would be probative of the
13 ownership of the art. And that's very consistent with
14 the other categories that we've listed that you've
15 already covered, like the insurance. They claim to own
16 this painting, Judge. And, like, what they're saying and
17 doing with it, including not having it, not insuring it,
18 not filing UCC liens, is all from our perspective for
19 trial indicia of them not really owning it. So that's
20 why we asked for communications with the press and the
21 media. I can't imagine it's too burdensome. If they ask
22 their client and the answer is like, "Oh, I've never
23 communicated with the media about this or any of this,"
24 then it's over. I just don't know the answer to the
25 question. We're just asking it for the discovery.

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MR. MCBRIDE: And, your Honor, this is Webster McBride for Satfinance. Again, I can't imagine there's any there; but if this will resolve things, we're happy to confirm.

THE COURT: Okay. So this is what I'll say: Given the late stage at this point, I'm not going to have Satfinance conduct another search; but if you just want to confirm with your client, it seems like -- what you indicated was that this was a private agreement; he wouldn't -- I'm sorry, not "he" -- Satfinance wouldn't have communicated to the media about it. If this is just a question you could raise with them and see -- but I'm not going to say that you have to now conduct another document search and search for these communications. Does that make sense to everyone?

MR. MCBRIDE: Webster McBride for Satfinance. That sounds fine. We're happy to do that.

MR. SHAPIRO: Understand the ruling here, Judge. Thank you.

THE COURT: And then, Mr. McBride, I just want to make sure your objections have been covered. Was there any other category that you have issues with from Athena's production that you'd like to raise?

MR. MCBRIDE: So at this point I think the only

document concern we have is that second half of 2016. However, I do just want to remind the Court that we believe that the Court and we are entitled to an affidavit or an affirmation, in fact, from Rebecca Fine, Athena's in-house counsel at all relevant times, providing an account for what went wrong in the early stages of this litigation so that we can be satisfied that there are no spoliation concerns that we need to be looking into and so that we can come to a conclusion as to what sort of remedy, if any, we should seek.

And we would also like an instruction to Mr. Weiss to comply with the subpoena to produce documents served on him several months ago where again he either has deleted text messages or failed to search for them. We don't know which, but we have a copy of a text message that was plainly responsive to a subpoena. He failed to produce it. He claimed there were no responsive documents. So I want an explanation for that, too, so that we can be satisfied that we are in fact receiving all that we're entitled to.

THE COURT: So can I just clarify? Have you got -- you have a representation from counsel that they instituted appropriate document preservation protocols and preserved documents. Why does that not settle it?

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MR. MCBRIDE: Largely because --

THE COURT: It sounds like (indiscernible) just, you know, dropped the ball.

MR. MCBRIDE: Well, it's hard to -- it's not -- it's hard to believe that it was a dropping of the ball that meant that zero internal communications were produced over the course of two years when, even accepting at face value that they had drafted some objections that they sat on for a year despite our filing letters to the docket saying hey, Athena hasn't objected -- what -- Athena hasn't objected. None of those objections said we decline to produce any internal communications. You know, there's no basis, even purportedly stated. It's hard to take at face value that this was just the ball was dropped. And we'd like to know dropped by whom. Dropped by in-house counsel, dropped by predecessor counsel. You know, it seems like egregious --

THE COURT: Can I ask you --

MR. MCBRIDE: -- excuse me? Sorry?

THE COURT: I don't mean to cut you off. It's just hard to do with these phone conferences. But just a related question. The email communications that were not produced until recently, were those things that you would

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2 have -- that's not the right way to phrase it -- but are
3 there certain communications that you would have wanted
4 to ask witnesses about that you didn't get an
5 opportunity?

6 MR. MCBRIDE: Absolutely. Again, we had -- we
7 want to ask Athena's 30(b)(6) deponent about discussions
8 between and among Athena employees, officers, about the
9 due diligence they performed on Inigo Philbrick and this
10 painting. For example, again, we had not a single email
11 between or among Athena employees. And absolutely we
12 would want to ask, you know, copious questions on those
13 documents at depositions.

14 MR. GROSSMAN: Your Honor, this is Judd
15 Grossman. Just to add to Mr. McBride, we did depose
16 Athena's former CEO without the benefit of any of these
17 documents. So not only going forward, but looking back,
18 we were greatly prejudiced by the absence of those
19 documents at that critical deposition.

20 THE COURT: So I guess this is what I'll say on
21 the issue. Like, I understand you want an explanation.
22 To me the more relevant issue would be to confirm that
23 they've preserved everything, turned everything over, and
24 then to the extent necessary, you know, I'd be willing to
25 say you'd have an opportunity to reopen the 30(b)(6) and

1 the witnesses for whose internal communications you
2 didn't have at the time of those depositions. But I'm
3 just not sure it really would be a useful exercise of our
4 time to try to get any further explanation than the one
5 we've heard here from counsel.

6
7 MR. MCBRIDE: Your Honor, Webster McBride for
8 Satfinance. I suppose that sounds okay. We'd
9 respectfully request that that representation come in an
10 affidavit from Ms. Fine, who was actually present at the
11 time, not from incoming counsel who's been formally
12 involved in this case only for the last two months.

13 THE COURT: Okay. I mean, I certainly think
14 that's fair. Could in-house counsel represent that
15 they've -- and just detail the procedures they took to
16 preserve the documents?

17 MR. SHAPIRO: So, listen, your Honor, the short
18 answer is sure. But the long answer is, like, this is a
19 company that relied on a lawyer that is now gone. This
20 was not an insignificant thing for all involved. We had
21 to fix the problem. There's no -- there's no basis
22 whatsoever on the planet to suggest things weren't
23 preserved. We just produced 50,000 pages in a small
24 case. And there's no gaps. There's no -- I mean, all
25 the things you would look at where both as the producing

1 party and the receiving party you would look to see if
2 there was like some indicia of like a problem. There's
3 none of that. The whole matter's been the subject of a
4 criminal investigation with the United States Attorney's
5 Office that resulted in Mr. Philbrick like being
6 convicted by plea in which Athena, you know, it was
7 involving Athena alone. Nothing has gone missing. I'm
8 happy to ask Ms. Fine. It feels kind of abusive.

10 MR. MCBRIDE: And if I may, your Honor? You
11 know, hearing everything Mr. Shapiro is saying, A, it
12 seems like okay, please have Ms. Fine state that in an
13 affidavit. What's the burden there if everything he says
14 is the case? And, B, I think that our reading of the
15 situation is, you know, further colored again by what
16 happened yesterday where Mr. Weiss -- we don't know what
17 happened to this text message, but it was clearly
18 responsive. Our subpoena sought a very specific category
19 of documents from a very specific time frame. He said he
20 had nothing. We know he had something. We don't know if
21 he destroyed it. We don't know if he just failed to
22 search for it. We don't know. But once again, even with
23 new counsel, we're having the same issue. So we just
24 would have liked to have some definitive representation.

25 MR. SHAPIRO: If I may, Judge? The text message

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2 that counsel keeps referring to was not to Mr. Weiss or
3 from Mr. Weiss. If there needs to be a motion practice
4 on that, we would just ask that we have an opportunity to
5 brief it up and do it in some sort of normal way as
6 opposed to on-the-fly incriminations because it's not
7 substantiated; it's not what's before the Court; and it's
8 serious.

9 MR. MCBRIDE: Agreed that it's not before the
10 Court. But the text message was from Mr. Weiss.

11 THE COURT: Well, since --

12 MR. SHAPIRO: Exhibit 2 to -- oh, pardon me,
13 Judge.

14 THE COURT: No, no, go ahead.

15 MR. SHAPIRO: I was just going to say
16 Exhibit 2 -- I didn't mean to cut you off, your Honor --
17 Exhibit 2 to the deposition yesterday was an email
18 between an outside director for Yieldstreet within the
19 control group, okay, and Mr. Pesko. It was not Mr.
20 Weiss's text message.

21 MR. MCBRIDE: In which he copied and pasted a
22 text message from Mr. Weiss.

23 MR. SHAPIRO: And the antecedent of "he" is
24 someone other than Mr. Weiss.

25 THE COURT: Okay. So the -- I think on the

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2 issue of in-house counsel, I'm not -- I don't think that
3 this has to be overly burdensome. It would just be a
4 representation in an affidavit that they had instituted
5 document preservation protocols and specifically, you
6 know, what those protocols were. I don't think that
7 would be overly burdensome at this point given that it
8 was a significant period of time that elapsed before
9 Athena did produce any internal or external
10 communications.

11 On the issue of the Weiss text message, if the
12 parties want to raise that separately, you know, you can
13 come back before me. But I thought I saw at some point
14 there being a request for all text message and WhatsApp,
15 and I think Athena saying that they were missing that.
16 WhatsApp messages, text messages. Am I wrong?

17 MR. MCBRIDE: This is Webster McBride for
18 Satfinance. Athena did raise that. Athena has produced
19 zero text messages, zero WhatsApps. Satfinance has
20 produced 400 pages of text messages and a few WhatsApp
21 chains.

22 THE COURT: Has --

23 MR. MCBRIDE: And if you look -- sorry?

24 THE COURT: No, I just want to confirm, has
25 Satfinance produced all the text messages and WhatsApp

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2 that were requested and are in your possession? Are
3 there things you're withholding?

4 MR. MCBRIDE: No, no, nothing's being withheld,
5 no.

6 THE COURT: Okay. And then Athena -- so has
7 Athena collected these text messages, WhatsApps? Do they
8 exist?

9 MR. SHAPIRO: So I'm aware of a couple that will
10 be on our privilege log. As a general matter, just by
11 being familiar with the client and this particular file,
12 I mean, Athena's like a bank. I mean, it issue -- you
13 know, it's part of a business that issues securities.
14 It's not -- like these relationships are documented in a
15 way that's fairly formal. So, I mean, it's secured
16 lending. So I mean, like the files and the
17 communications with the borrower and things, they're not
18 -- it's like -- it's a little more old school.

19 THE COURT: So are you basically saying you
20 searched for text messages and WhatsApps and whatever and
21 that type of communication, and there was nothing?

22 MR. SHAPIRO: I'll check, but I will tell you
23 that, A, I know we have a couple, because I'm in the
24 process of reviewing, you know, the privilege log. And I
25 know there's a couple on there is all I'm saying. And we

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can go back and look at anything, Judge. Our point is we're not withholding any --

THE COURT: But the -- I understand if you're withholding them on privilege. I guess I just would like Athena to confirm --

MR. SHAPIRO: Sure.

THE COURT: -- that they searched for WhatsApp, text messages, whatever other type of app communication that was requested and that you can represent that the only thing you're withholding was on privilege grounds.

MR. SHAPIRO: And I will do precisely that.

MR. MCBRIDE: Your Honor?

THE COURT: Yes.

MR. MCBRIDE: If I may, this is Webster McBride for Satfinance. With regard to the Fine affidavit, one other thing that we would respectfully request is that Ms. Fine represent that the responses and objections served 14 months late were in fact prepared in March of 2021.

MR. SHAPIRO: Your Honor, on that --

THE COURT: Well, how would she know that? I mean, how could she represent that if it was prepared by outside counsel?

MR. MCBRIDE: She's been very involved in this

1 litigation from the beginning. You know, she was present
2 at various depositions. Our understanding is that she
3 has been very active. And, you know, if she can't
4 represent that, she could represent that she has no
5 knowledge. But we would think that she could.

7 THE COURT: But I'm just -- I'm wondering,
8 they're not relying on the objections. They've given you
9 everything. And potentially you can come back to me, as
10 I indicated earlier, and you could tell me, well, these
11 are the email communications we would have questioned the
12 30(b)(6) witness on. And as I've indicated, I'd be
13 willing to let you reopen that deposition or a similar
14 deposition. So what do you get from a representation
15 that says that outside counsel drafted this in March of
16 2021?

17 MR. MCBRIDE: Yes, and that is fair. I think
18 that our concern here is really just that, you know, it
19 seems like something went wrong, and late-arriving
20 objections and responses just adds to our questions of
21 what's going on here. So -- but it's a fair point that I
22 don't think it would give us anything more substantively.

23 THE COURT: Okay. I think as long as she just
24 explains the document-retention policy that was
25 instituted, when it was instituted and that they didn't

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2 just -- you know, they did what they were supposed to do
3 in the regular course. Given that you've basically, I
4 think, effectively -- I mean, I understand this is a
5 delay and there was a waste of time, but I'm trying to
6 make you as whole as possible, given the issues. And
7 they've turned over the documents. So I'm not inclined
8 to have her make an additional representation on what
9 opposing counsel did in March of 2021.

10 MR. MCBRIDE: Okay. Understood, your Honor.

11 THE COURT: Is there --

12 MR. SHAPIRO: Your Honor, just one more small
13 point? Because -- only because your Honor noted it twice
14 about reopening the 30(b)(6) deposition to cure
15 prejudice. They never took that deposition. Right? I
16 mean, we're waiting to schedule it.

17 THE COURT: Well, I think it might have been --
18 I'm sorry if I labeled it a 30(b)(6) witness. I thought
19 Mr. McBride indicated that he took the deposition of a
20 CEO where there were --

21 MR. SHAPIRO: That's an additional gentleman.
22 And that one's already --

23 MR. MCBRIDE: A former CEO, correct.

24 THE COURT: Former CEO, right, where there now
25 seems to be a substantial number of email communications

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that they would have questioned him about?

MR. SHAPIRO: I don't know. The deposition's still open. I mean, like -- I mean, if they want more time, he's a nonparty now; he's our former CEO. Like, the notion this would ever wind up in front of your Honor, frankly. Like, we heard you. I just want it to be clear that it wasn't the 30(b)(6) because that one had not in fact commenced.

THE COURT: Okay. Well, so there's no other issues, then, you know, thank you for your time. And you can always write us another letter if there's something else that comes up.

MR. MCBRIDE: Thank you, your Honor.

THE COURT: Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Athena Art Finance Corp. v. that Certain Artwork By Jean-Michel Basquiat Entitled Humidity, 1982, In Rem, Docket #20-cv-04669-GBD-VF, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: August 12, 2022